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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY, *et al.*,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

and

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents,

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

With consent of all the parties, the National Association of Manufacturers (NAM) files this brief in support of the Petitioners. The NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. NAM represents approximately 12,000 manufacturing and related businesses and is affiliated with an additional 158,000 organizations through

our National Industrial Council and Associations Department. The membership of NAM represents an estimated 80 percent of all goods manufactured in the United States.

The members of NAM are critically involved in the production and development of all manufactured products and those resources needed to fuel and sustain our industrial base. Thus, NAM members are regulated by most federal regulatory agencies including the Nuclear Regulatory Commission (NRC). Further, since the passage of the National Environmental Policy Act of 1969 (NEPA) the NAM membership has been involved in meeting the requisites of this congressional mandate. The instant decision involves the extension of NEPA beyond traditional bounds that have already been delineated by various courts including the Supreme Court. In our view, the potential impact of this decision is quite broad. Despite the efforts of the Court of Appeals for the District of Columbia Circuit to limit the decision to this specific factual situation, we believe the impact of this decision will be used in future decisions concerning other federal regulatory agencies. Hence, there is great potential for many NAM members to be affected by this decision and, as such, NAM has great concern about the ultimate ruling in this case.

SUMMARY OF THE CASE

In March of 1979 there was an accident at the Three Mile Island Nuclear Station Unit 2 (TMI 2). At that time, Three Mile Island Unit I (TMI 1) was shut down for ordinary maintenance and refueling. The NRC then ordered TMI 1 to be shut down indefinitely pending a hearing to determine safety-related issues at the plant. At the same time the Commission stated that it did not know whether psychological stress would be regarded as legally relevant to any determination relating to the restarting of TMI 1. Petitioners, People Against Nuclear Energy (PANE), attempted to intervene in the hearing on the restart of TMI 1 alleging that the TMI 2 accident

had caused severe trauma and stress and that the reopening of TMI 1 would aggravate and perpetuate this stress. The NRC ultimately excluded PANE's contentions from the hearing. PANE thereafter filed suit and on May 14, 1982, an amended final judgment was rendered by the United States Court of Appeals for the District of Columbia Circuit. The decision requires the NRC to determine if there is significant new information regarding psychological health since the license for TMI 1 was issued. If there is such information, the NRC must then prepare a supplemental environmental impact statement which would include a comprehensive evaluation of the psychological health effects relating to the restart of TMI 1.

SUMMARY OF THE ARGUMENT

The Circuit Court of Appeals has erroneously applied NEPA to allegations of psychological stress as a cognizable environmental impact. Further, the court makes arbitrary distinctions between types of trauma or anxiety. This is beyond the scope of NEPA. Drawing distinctions as to stress or anxiety are appropriate exercises for Congress or the regulatory authorities but not for the judiciary.

Other case precedent has already considered the significance of psychological stress in the NEPA process. The decision below is not in keeping with this tested precedent.

THE ARGUMENT

I. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ERRONEOUSLY DETERMINED THAT NEPA REQUIRES AN ASSESSMENT OF PSYCHOLOGICAL STRESS

When NEPA was passed in 1969, Congress recognized the necessity to juxtapose the purposes of any major federal action with the quality of man's environment. The purpose was not to inhibit or suspend major actions but to assure that the environment was not sacrificed. To

further this national goal, government agencies must prepare environmental impact statements. The interests of NEPA were to be in concert with other national objectives.

> NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by "all practicable means, consistent with other essential considerations of national policy." NEPA § 101(b), 42 USC § 4331(b) [42 USCS § 4331(b)]. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976).

To achieve this purpose there are detailed procedures and obligations defined in the Council on Environmental Quality (CEQ) regulations, 40 C.F.R. §§ 1500 *et seq.* (1982), with which all federal agencies must comply.[1]

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[1] The Court has added another novel dimension to NEPA which has not been raised by either Petitioner. The Court suggests that if a regulatory agency retains any oversight or responsibility over a proposed project that must comply with NEPA procedures, there is a continuing responsibility on the part of the agency to update impact statements upon receipt of information indicating a change of circumstances that might affect the environment. This is despite the fact that there may be no proposed changes to the major project. This issue, although not dispositive of this case, begs for judicial clarification. NEPA was not designed as a continual process. Rather, once the impact is assessed the project may be undertaken. Hence, there is some finality to the process that is incentive for companies to undertake major capital projects. In the wake of this decision, any further oversight by a regulatory agency would require continual update of environmental impacts. This is unnecessary as the CEQ regulations provide for update assessments in situations where changes in a project could impact the environment. To suggest that there is this continuous responsibility burdens the process and could have a chilling effect on future proposed actions.

Additionally, this concept would apply to many federal regulatory agencies that have a much larger regulated constituency than the NRC. Specifically, EPA would be unreasonably burdened in the licensing and permitting process under the Federal Water Pollution Control Act of 1972, 42 U.S.C. §§ 1857 *et seq.*, or the regulation of disposal sites under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.* This mentions only the tip of the ice-

Compliance with the requisites of NEPA is a long, exhaustive effort that views the in-depth effects of the proposed action. In the aftermath of the decision of the Circuit Court of Appeals, it now appears that psychological stress is to be given the same deference as those factors relating directly to the environment. In the case at bar, the suggested "psychological stress" was not associated with the actual safety of TMI 1. Rather, the stress was a product of the fear and anxiety attendant to the restart of the nuclear unit. This is not a direct impact on the environment or human health as contemplated by the statute or appropriately considered in the entire NEPA process. Further, the court has used judicial fiat to decide when contemplation of stress is appropriate under NEPA. The majority makes an arbitrary distinction between types of trauma or stress. In this instance, since the residual stress or anxiety is associated with fear of the possible restart of the operation of a nuclear power plant, compliance with all NEPA procedures is warranted according to the court.

This approach to the interpretation of a congressional statute is beyond judicial power. It is the Congress that is empowered with the duty and ability to decide national policy goals, how they are to be achieved, who is responsible for their implementation, and what issues, factors, and parties are to be covered or considered. A court cannot selectively determine when the statute applies and what are necessary procedures, particularly when distinctions are being made based upon specific facts and predilections. The majority's disfavor of nuclear energy is as apparent as their basis for selective application of NEPA procedures is lacking. This issue has been before this Court before wherein the Court stated:

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berg as to how far reaching this decision could be. Thus, clarification of this issue would be most advantageous in the ultimate resolve of these important issues.

> It is in the light of this background of statutory and decisional law that we granted certiorari to review two judgments of the Court of Appeals for the District of Columbia Circuit because of our concern that they had seriously misread or misapplied this statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

Any determination of procedures is the responsibility of Congress or the federal agency, in this instance the NRC, to prescribe what are the requisites of meeting the statute. The role of the court is to see that the mandates of Congress are met and that any regulations do not exceed or fall short of the statutory purposes. Courts are not responsible for determining specific procedures.

Now, the Court of Appeals for the District of Columbia Circuit dictates that psychological stress requires further environmental assessment, and, any significant incidence of such stress will necessitate additional findings pursuant to NEPA. Further if there are indications of psychological stress, NEPA applies because such stress is an effect on human health. However, the dissenting opinion by Judge Wilkey aptly points out the error of the majority opinion:

> This takes NEPA far beyond its intended purpose. *The environmental effects of a federal activity are now to include the views of the population itself on the very desirability of the activity*, as expressed through the alleged psychological distress people may suffer if the activity goes forward—no matter how scientifically ignorant and divorced from reality those views (fears) may be. In my view, this is a judgment for Congress, and one which has already been made in the case of nuclear power. *PANE v. NRC*, 678 F.2d 222, 239 (D.C. Cir. 1982) (Wilkey, J., dissenting) (emphasis in original) (footnote omitted).

Congress enunciated policies and goals in the enactment of NEPA. One of the stated goals is to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities . . . ." 42 U.S.C. § 4331 (1976). The NEPA process was developed to look at all factors involved with a major proposal and its direct impact on the environment. The siting of a nuclear plant necessarily includes consideration of the surrounding community. This was initially accomplished with the nuclear facility at TMI. In the aftermath of the incident, the NRC, considered what they determined were legitimate concerns attendant to the restart of TMI 1 following the incident at TMI 2. At the discretion of the NRC, an Environmental impact analysis and supplement were prepared.[2] The staff concluded there were no significant environmental impacts beyond those that were originally identified and evaluated when the plant was initially licensed. Safety of the operation of the plant is the crux of the decision and should not be diffused by questions of fear or stress occasioned by the concept of the restart of TMI 1. Stress and anxiety are speculative. What is stress to one individual may be tonic to another. To require assessment of such a nebulous, nonquantifiable issue puts an unnecessary burden upon the process of reviewing environmental impacts.

Now the court is saying that, in this instance the restart, and in another instance possibly the very operation of a nuclear facility, must contemplate psychological stress as a primary factor in any NEPA determination, regardless of any direct environmental effect. This has the potential to stymie any potential resolution of a proposed federal action. It gives precedence to speculative and individual perceptions rather than dealing with the readily ascertainable direct impacts of a major action on the environment. Additionally, the court below endeavors

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[2] Joint Appendix at 48-88.

to draw distinctions between social dissatisfaction and medically recognized psychological impairments.[3] Such distinctions are fallacious in the context of NEPA requirements. It strains credulity to suggest that one can rationally differentiate between the fear and anxiety generated due to proximity to a nuclear plant and that generated due to proximity to a federal prison. The latter issue was determined not to require additional NEPA determinations. As Judge Wilkey points out in his well-reasoned dissent, *"In each case, however, what we are dealing with are fears and anxieties; if NEPA embraces fears and anxieties in this, it must in all."* *PANE v. NRC*, 678 F.2d at 241 (D.C. Cir. 1982) (Wilkey, J., dissenting) (emphasis in original).

To approach the instant situation involving the restart of TMI 1 as this court suggests is a usurpation of congressional authority and not in keeping with decisions in other NEPA challenges.

II. THIS DECISION IS CONTRARY TO OTHER COURT DECISIONS

The concept of psychological stress and its relationship to environmental concerns under NEPA is not novel. There have been several courts that have grappled with this issue and reached a contrary result to the court below. Admittedly, no other case has involved a nuclear energy facility. However, as argued in the dissenting opinion, it is inconsistent to determine that psychological stress is entitled to more attention in one situation than another. The ultimate desirability of any law is to treat generic situations with an even, single approach.

Various courts have already disposed of stress arguments and their cognizability under NEPA. In the Sixth Circuit, the court required "a primary impact on the physical environment." *Breckinridge v. Rumsfeld*, 537 F.2d 864 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061

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[3] *PANE v. NRC*, 678 F.2d at 228-30.

(1977). Similarly, other courts have considered the impact on the locality of socially undesirable facilities and have determined that NEPA did not apply to those situations. *E.g., Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (location of a jail); *Nucleus of Chicago Homeowners Association v. Lynn*, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976) (proximity of public housing). The D.C. Circuit has already determined that the introduction of low-income workers in a suburban setting does not activate NEPA consideration of trauma or stress. *Maryland-National Park and Planning Commission v. United States Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973). In the face of these decisions, it is untenable that now this court accords great pre-eminence to the instant situation than those cases now decided.

CONCLUSION

The court below has made two departures from recognized precedent. Initially, the court mandates that psychological stress is a primary impact cognizable under NEPA procedures. The court has stepped beyond its judicial role and has assumed the stance of a regulatory body. This is beyond the authority given to judicial panels. Secondly, the court disregards judicial precedent concerning the issue of psychological stress. The court makes a distinction that this case is separate from other decisions because it involves the operation of a nuclear facility. The future use of this deviation from the statute and court precedent invites mischief in any and all areas of congressional determination and agency implementation of a given law. Raising the issue of psychological stress in the NEPA process has the potential to delay, thwart or prohibit the fruition of major federal actions. This is clearly not what Congress intended with the enactment of NEPA. The desirable result is that man and his accomplishments are to exist in harmony with the environment to the benefit of society as a whole. If fur-

ther specificity of mandates and procedures is warranted, it is Congress that must outline any additional or more comprehensive areas of compliance.

Thus, we respectfully request this Court to reverse the decision of the lower court.

Respectfully submitted,

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